FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 407

GEORGE B. MONROE, RECEIVER, PETITIONER,

vs.

LOUIS RAPHAEL, RESPONDENT.

BRIEF IN BEHALF OF LOUIS RAPHAEL, RESPONDENT.

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MAURICE H. HORBLIT,
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Louis Raphael.

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Supreme Court of the United States

October Term, 1932.

No. 407.

GEORGE B. MONROE,

Receiver,
Petitioner,

vs.

LOUIS RAPHAEL,

Respondent.

BRIEF IN BEHALF OF LOUIS RAPHAEL, RESPONDENT.

Statement of the Case.

This writ of certiorari, granted on the petition of George B. Monroe, Receiver, brings to this court for review, a decree of the United States Circuit Court of Appeals for the First Circuit dated June 27, 1932 (R. 75). Said decree was entered in pursuance to an opinion of a majority of that court (R. 64 to 72). It reversed an order of the United States District Court for the District of Massachusetts, dated December 7, 1931, which order enjoined this respondent from proceeding beyond judgment in a suit theretofore begun and prosecuted by the respondent in the Massachusetts Superior Court against the principal and sureties on a bond (R. 59).

The material facts are shown in the transcript of record by an agreed statement (R. 1 to 4). Paragraphs H and I of said agreed statement incorporate by reference the statements of two other documents, namely: the "Petition for Leave to Institute Proceedings Upon Bond" (R. 7 to 14) and "Plea of Louis Raphael" (R. 33 to 38). From these three documents, the following undisputed facts appear:

A. THE PROCEEDINGS IN THE DISTRICT COURT CONCERNING MONROE STORES, INC.

On July 14, 1930, four creditors of Monroe Stores, Inc., a Massachusetts corporation, as joint plaintiffs appearing by Andrew J. Aldridge, Esquire, filed a bill in equity in the United States District Court for the District of Massachusetts against said corporation as the sole defendant in said bill. Said bill is entitled *J. B. Hirshfeld & Co., Inc., et al., plaintiffs, vs. Monroe Stores, Inc., defendant,* and is numbered 3293 Equity on the docket of said District Court (R. 1).

The bill alleged that said Monroe Stores, Inc., "was engaged in the business of operating chain stores for the sale of dry goods," that its liabilities aggregated about $95,000.00, but that its "assets exceeded its liabilities"; that it could not meet its obligations as they matured "without a great sacrifice in value" of its assets which had been invested; that creditors had already made some attachments and other attachments were threatened. The bill alleged that a receiver was therefore necessary "in order to conserve its assets and to avoid threatened attachments, waste and loss." The bill accordingly prayed for a receiver (R. 1 & 2, par. A).

1. The Receivership, by Consent of Monroe Stores, Inc.

On the date of the filing of said bill, an order of notice was issued thereon returnable on July 21, 1930, directed to said defendant, Monroe Stores, Inc., to show cause why a receiver should not be appointed (R. 2, par. B). Service of said order was accepted in behalf of said defendant, Monroe Stores, Inc., by Thomas W. Morris, Esquire, who appeared as its attorney and filed an answer in its behalf admitting the allegations of the bill and assenting to the prayer for the appointment of a receiver (R. 2, pars. B and C). The District Court accordingly entered a decree on July 23, 1930, appointing George B. Monroe of Quincy, Massachusetts (the treasurer of Monroe Stores, Inc.) as receiver, with authority to carry on the business of the corporation (R. 2, par. D). Five days later, to wit, on July 28, 1930, said receiver, having duly qualified, filed a petition to employ said Andrew J. Aldridge and said Thomas W. Morris, Esquires, as counsel for the receiver, which petition was allowed on the same day (R. 2, par. E).

Thereafter, the District Court issued an order requiring persons holding claims against said Monroe Stores, Inc., to present their proofs of claim to said receiver on or before September 30, 1930. Later, the time fixed in said order was extended by the court to November 15, 1930 (R. 8, par. 3). This respondent duly presented his proof of claim to said receiver on September 25, 1930 (R. 8, par. 4).

2. Dempsey's Offer.

On November 10, 1930, the receiver petitioned for, and the District Court granted him, "leave to advertise for sealed bids for all the assets and property of the defendant

corporation including cash on hand, merchandise, fixtures, good will and all other assets" (R. 2, par. F). On November 25, 1930, one Harold A. Dempsey filed an offer to purchase all said assets (R. 2 and 3, par. G, and pp. 10 to 13, Exh. A).

The court's attention is respectfully directed to the express stipulation of the parties, namely, that

> "the statements concerning said offer and concerning the other proceedings set forth in the petition entitled 'Petition by Louis Raphael, a Creditor of Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond' and numbered 3 in the praecipe *are true,* and the copies of the offer and of the bond thereto annexed as Exhibits A and B are true and correct copies of said respective documents" (Par. H of Agreed Statement, R. 3).

The petition so referred to in said stipulation (R. 7 to 9 incl.) expressly shows that Dempsey's offer was "filed in this court" (R. 7, par. No. 1). The offer bears the name of the District Court and the name of the case (R. 10), and it specifically stipulates for the "acceptance of this offer by the court" (R. 12, par. No. 8).

By the terms of the offer, Dempsey assumed several and distinct obligations: (a) for the benefit of the creditors, (b) for the benefit of the receiver and (c) for the benefit of the stockholders of said Monroe Stores, Inc.

As to creditors, the offeror became obligated to pay thirty per cent of their respective claims "in or within thirty days after their claims have been duly approved and allowed, it being understood that said creditors shall include only those creditors who have filed their proof of

claim with the Receiver pursuant to the order of this court on or before the 15th day of November, 1930." The offer stipulated that Dempsey "shall have the right to contest any and all claims in which the receiver sets forth a good objection to the allowance of said claims" (R. 10 and 11, par. No. 1).

As to the receiver, Dempsey undertook, in a separate paragraph, to "pay any and all liabilities of the receiver [for merchandise, administration expenses, counsel fees, etc., not exceeding $20,000.00] within thirty days after said claims against the receiver have been duly allowed by this Court" (R. 11, par. No. 2).

As to the stockholders, Dempsey obligated himself to convey all the assets to a corporation which was to have three classes of stock, namely, preferred, Class A and Class B, and the stockholders of Monroe Stores, Inc., were given a right to acquire preferred and Class A stock (R. 11 and 12, pars. Nos. 3 to 5).

Dempsey further offered, among other things, to "present to the court," within seven days after the acceptance of his said offer, "a bond in the penal sum of $100,000.00 with good and sufficient sureties" to be conditioned upon his performance of "the obligations of the offer" (R. 12, par. No. 7).

3. Dempsey's Bond and the "Good and Sufficient Sureties."

Dempsey's said offer was duly accepted and he thereupon "filed in this court" *(i. e.,* in the District Court) a bond in the penal sum of $100,000.00 (R. 8, par. No. 2).

By said bond dated November 23, 1930, the principal and sureties "are firmly bound and obliged unto the United States of America in the full and just sum of $100,000.00." The condition set forth in the bond refers to Dempsey's said offer and to the requirement of "a bond guaranteeing the performance of the conditions and terms" thereof, and then states that "if the said Harold A. Dempsey shall comply with all the conditions and items of said offer, then this obligation to be void, otherwise to be and remain in full force and virtue" (R. 13 and 14, Exh. B).

Two individuals, namely, Louis F. Buff and Clifford S. Drake signed the bond as sureties (R. 14), and on December 2, 1930, they filed in court affidavits for the purpose of qualifying as "good and sufficient sureties" (R. 4-7 incl.).

Drake's affidavit stated that he was then the owner of certain "free and clear real estate" (consisting of a 'List of Properties' thereto annexed, R. 5-6) aggregating "at assessed values" $80,255.00; that he had an equity in three other parcels amounting to $12,600.00 (R. 6); that he owned "outright not less than $75,000.00 worth of tax titles," that he had first mortgages amounting to $5,000.00 and "good stock exchange collateral worth $29,000.00, making total assets of not less than $201,855.00 and my liabilities do not exceed $43,600.00, making my net worth not less than $158,255" (R. 4 and 5).

Buff's affidavit stated that he owned equities valued respectively at $49,000.00, $94,000.00 and $53,000.00 in three parcels of real estate in Boston, Massachusetts, that he owned preferred stock of the Henrici Laundry Machinery Co. worth $150,000.00, that his credit was good and that he was "worth in good property not less than $600,000.00 over

and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property" (R. 7).

Upon the filing of said affidavits, which showed the net worth of the sureties to be more than seven and a half times the penal sum of the bond, "said bond and said sureties thereon were duly approved by the court on December 2, 1930" (R. 8, par. No. 2), and thereupon, the receiver conveyed to Dempsey all the assets of Monroe Stores, Inc. (R. 9, par. No. 6).

4. The District Court Authorizes Raphael to Sue on the Bond.

This respondent's proof of claim was "duly approved and allowed" on February 9, 1931, in the sum of $35,000.00 (R. 8, par. No. 4). Dempsey, Drake and Buff "duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel" (R. 8, par. No. 4). After the lapse of thirty days from the date of allowance of his said claim, the respondent, on or about March 12, 1931, "duly demanded" of Dempsey, Drake and Buff, payment of the thirty percent of the amount thereof, to wit, $10,500.00 (R. 9, par. No. 4). Thereafter, the respondent received "through counsel for said Harold A. Dempsey on account of the amount due him as aforesaid" the sum of $1200.00, leaving an unpaid balance of $9300.00 "with interest thereon from March 11, 1931, when demand for payment was duly made by him as aforesaid" (R. 9, par. No. 5).

As no payment was made on said balance, the respondent, "after conferring with said receiver and with his

knowledge'' (R. 34, par. No. 3), filed in said District Court, on March 23, 1931, his said petition (R. 7-9) praying ''that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond'' (R. 9). An order allowing the prayer of said petition was duly entered by said court March 23, 1931 (R. 10).

B. THE SUIT ON THE BOND BROUGHT BY THIS RESPONDENT AS "RELATOR" AGAINST DEMPSEY, DRAKE AND BUFF IN THE MASSACHUSETTS SUPERIOR COURT.

1. The Respondent Obtained, in the State Court Proceedings, Liens by Attachment and Injunction on Property of Drake and Buff.

On April 9, 1931, the respondent as ''relator'' brought, in the Superior Court for the County of Suffolk in the State of Massachusetts, a bill in equity on said bond in the name of the United States of America as plaintiff against said Dempsey, Drake and Buff, as defendants, to reach and apply in equity, under the Massachusetts General Laws, chap. 214, sec. 3, certain shares of stock and other property of said Drake and Buff toward the payment of said balance due him on his said claim. Said bill was entitled ''*United States of America, ex rel., Louis Raphael vs. Harold A. Dempsey, et als.*'' (R. 3, par. 1).

In the interest of clarity, the respondent, at this point, respectfully directs the attention of the court to the stipulation of the parties to this cause that the facts as to the proceedings on said bill in the Suffolk Superior Court and also as to ''the proceedings in said United States District

Court in said case of *J. B. Hirshfeld & Co., Inc., et al., vs. Monroe Stores, Inc.*" are truthfully set forth in the "Plea of Louis Raphael" (R. 3, par. I). Said plea and exhibits A, B, C, and D thereto annexed appear on pp. 33 to 50 of the transcript of record.

By said plea, so incorporated in said stipulation, it appears that "in said Superior Court proceedings, said Raphael [the respondent] obtained and now has attachments upon property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him" (R. 36, par. No. 9).

2. The Motion to Dismiss.

On May 25, 1931, Dempsey, Drake and Buff filed, in the State Court proceedings, a motion to dismiss based on the ground that subsequently to the commencement of the State Court proceedings, an "ancillary bill of complaint" for breach of said bond had been filed against them in the United States District Court by counsel for the receiver (R. 34, par. No. 4). On June 15, 1931, said motion to dismiss being then reached for hearing, Dempsey, Drake and Buff waived said motion by a written stipulation filed in the Superior Court on said date (R. 34, par. No. 4 and pp. 38 and 39, Exh. A), and thereafter, filed an answer to the merits (R. 34, par. No. 5). Thereupon, said Superior Court case was referred to a master who heard evidence from about July 7 to about July 22, 1931 (R. 35, par. No. 5). George B. Monroe, the said receiver, and said Andrew J. Aldridge, Esq., one of the attorneys for said receiver, were both called by this respondent as witnesses before the master (R. 35, par. No. 5). The master filed his report on October 5, 1931 (R. 35, par. No. 6).

3. The Master's Report.

The master's report sets forth a summary of the bill brought in the State Court (R. 39 to 42), and a summary of the answer thereto filed by Dempsey, Drake and Buff (R. 42 and 43). The report then states the facts as to the proceedings in the United States District Court which led to the appointment of the receiver (R. 44, pars. No. 2 and 3), the due presentation and allowance of this respondent's claim in the receivership proceedings (R. 42, pars. No. 4 and 5), the advertisement for bids, the bid by Dempsey, the acceptance thereof, and the filing of said bond (R. 44 and 45, pars. No. 6, 7 and 8). The master finds that Dempsey "was merely a straw and nominee for the defendants Buff and Drake, and had no financial interest other than he was acting for them to purchase the property"; that he acted "as their agent" and "at their request," and that on December 2, 1930, the date of the approval of said bond by the District Court, Dempsey received from Buff and Drake a bond to indemnify him "against any liability or loss as the result of the offer, and on the bond which the said Dempsey signed as principal in the United States District Court" (R. 45, pars. No. 9, 13 and 14).

With respect to these findings by the master this respondent respectfully refers the court to paragraph No. 8 of the Ancillary Bill of Complaint filed by the Receiver which also sets forth that although Dempsey "appears as a purchaser of the assets * * * the said Louis F. Buff and Clifford S. Drake are the real parties in interest and the real purchasers of the assets" (R. 17).

The master finds that the $1200.00 paid to this respondent in March, 1931, "through counsel for" Dempsey (R.

9, par. No. 5), was money which was furnished by Drake and Buff (R. 48, par. No. 29).

It appears by the master's report, that after the receipt by Dempsey of the receivership assets, "the defendants Buff and Drake, through their counsel Thomas W. Morris, Esquire, organized a Delaware corporation, known as the Monroe Stores Corporation" and that Dempsey, at their direction, transferred all those assets to the new corporation (R. 46, par. No. 16); that Drake and Buff and their attorneys Thomas W. Morris and Ralph H. Robb, Esquires, were the only officers and directors of the new corporation, (which changed its name to W. E. Noyes Co. on December 31, 1930) (R. 47, par. No. 20), and that Dempsey received from that corporation "an agreement to save him harmless from all obligations of the offer made for the purchase of the Monroe Stores, Inc. property and his being principal on the bond" (R. 46, par. No. 18). It also appears by the master's report that "a similar agreement was given by the said [new] corporation to * * * Buff and Drake" (R. 46, par. No. 18).

The master found in favor of this respondent [Raphael] against Dempsey, Buff and Drake for the balance of $9300.00 with interest from March 12, 1931 (R. 48, par. No. 30). The defendant Drake testified before the master, "that the only reason he had for not paying the balance due the plaintiff [Louis Raphael] was because he has an agreement from the Monroe Stores Corporation to save him harmless" (R. 48 and 49, par. No. 31).

The master finds Buff to be the owner of a large number of shares of stock in various corporations, namely, Monroe Stores Corporation (later known as W. E. Noyes

Co.), Henrici Laundry Machinery Co., Babson-Dow Mfg. Co. and Buff & Buff Mfg. Co. (R. 46 and 47, pars. No. 19, 21, 22 and 23). Drake is found to be the owner of shares of stock in W. E. Noyes Co., and owner of 100 shares of preferred stock of Mullins Mfg. Co. (R. 46 and 47, pars. No. 19 and 25). The master also finds Drake to be the beneficial owner of a large number of parcels of land respectively standing of record in the names of seven nominees (R. 47-48, pars. No. 26 and 27), the depositor in three banks, and the holder of various mortgages on real estate aggregating approximately $150,000.00 (R. 48, par. No. 28).

4. Confirmation of the Master's Report and the Respondent's Motion for a Final Decree Thereon.

After the filing of the master's report, Dempsey, Buff and Drake filed a motion to recommit said report, alleging that their motion to dismiss was "still pending" (R. 49, Exh. C). The motion to recommit was denied on October 20, 1931 (R. 35, par. No. 6), as it clearly appeared that they had expressly waived their motion to dismiss by written stipulation filed in court several months before (R. 38 and 39, Exh. A), and that a motion to recommit based on that ground could have only delay for its object. They also filed a motion to amend their answer by adding thereto substantially the same allegation that had already been waived in the stipulation on the motion to dismiss, namely, the pendency in the United States District Court of said ancillary bill (R. 49 and 50, Exh. D). Said motion to amend was also denied by the Superior Court on October 20, 1931, after hearing, and on said last mentioned date, the Superior Court "duly entered an order upon the motion of said Raphael confirming said master's report" (R. 35, par. No. 6).

It is important to note that no objections or exceptions were filed to the master's report and that no appeals were taken from any of said orders entered in the Superior Court on October 20, 1931 (R. 35, par. No. 6). The time for appeal having elapsed, and the case in the Superior Court being "ripe for the entry of a final decree in accordance with the findings of the master in said report as confirmed" (R. 35, par. No. 6), this respondent filed in the Superior Court on November 13, 1931, a motion for the entry of a final decree. The respondent also submitted for the consideration of the Superior Court a proposed form of final decree (R. 28 to 31) "calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of said Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him" (R. 35, par. No. 7). Said motion for final decree was marked to be heard on December 7, 1931 (R. 35, par. No. 7).

5. The Federal Court's Order of Notice Suddenly Interrupts the State Court Proceedings.

The Superior Court case being thus ripe for the entry of a final decree and the motion for the entry of such a decree having been filed and marked for hearing in that court by this respondent, his counsel was thereafter, to wit on December 1, 1931, served with notice that the receiver had filed in the United States District Court, on November 27, 1931, in said original case of *J. B. Hirshfeld, Inc., et al., v. The Monroe Stores, Inc., No. 3293 Eq.*, the motion against this respondent which started this litigation between these parties (R. 27-33). The receiver's motion was to modify the order which had been entered in the United States District Court on March 23, 1931, and which had authorized

this respondent to sue on the bond in the name of the United States of America for his own benefit (R. 27 and 28). Said motion also prayed for an injunction against this respondent to restrain him from further prosecuting said State Court proceedings "except insofar as to reduce his claim to judgment" (R. 28).

The record shows that upon the filing of said motion, the District Court issued a temporary restraining order enjoining this respondent from proceeding with the State Court suit and an order of notice directed to the respondent returnable December 3, 1931 (R. 32). As this injunction suddenly interrupted the State Court proceedings, it is in order at this point to note what transpired in the Federal Court after this respondent had commenced the State Court proceedings.

C. THE PROCEEDINGS BROUGHT IN THE FEDERAL COURT AGAINST DRAKE AND BUFF, AFTER THE RESPONDENT'S STATE COURT SUIT HAD BEEN INSTITUTED, DID NOT REACH OR APPLY THEIR PROPERTY.

1. The "Ancillary Bill" in the Federal Court and the Disposition Thereof By a Consent Decree Providing for a Mere Unsecured Judgment.

It appears that on April 16, 1931, an "Ancillary Bill of Complaint" was filed in said District Court by Andrew J. Aldridge, one of said counsel for the receiver (R. 14 to 18). The United States of America was named as "petitioner" in said ancillary bill. The only defendants named therein were said Dempsey, as principal, and said Drake and Buff, as sureties on said bond (R. 14 and 15, pars. No. 2 and 3), certain corporations in which said Buff was alleged to own stock (R. 16, par. No. 6); two persons who

were alleged to hold the legal title to certain real estate for the benefit of Drake, namely, Ida M. Hodgson and Louise C. Castleman (R. 16, par. No. 7,; and the Atlantic National Bank of Boston in whose hands Drake was alleged to have deposited "a large amount of securities" (R. 16 and 17, par. No. 7).

Said ancillary bill recited said offer of Dempsey, the acceptance thereof and the filing of said bond "in this cause" (R. 14, pars. Nos. 1 and 2) and then recited:

> "There is due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors* who have filed their claims and which claims have been allowed by this court, a total balance of $34,856.14; that more than thirty days have elapsed since said claims were approved and allowed by this court and the payments thereon are past due and now owing. The obligations of the receiver which have not been paid by the said Harold A. Dempsey are past due and now owing" (R. 15, par. No. 4).

On May 4, 1931, an injunction was issued by said District Court on said ancillary bill restraining Dempsey, Drake and Buff from transferring or encumbering their property, or withdrawing funds from any banks, "until the further order of this court" (R. 18 and 19). Although said injunction provided for completion of pleadings on said ancillary bill by May 8, 1931, and for hearings before a master (R. 20), no evidence was heard thereon, and on July 16, 1931, a final decree, entered thereon by consent, merely ordered the entry of judgment for the plaintiff in the sum of $33,026.83 and costs against Drake, Buff and Dempsey, "jointly and severally, and that execution issue forthwith" (R. 20).

With respect to said ancillary bill of complaint, the respondent, Raphael respectfully directs the court's attention to the facts shown by the specific agreement of the parties to this proceeding, namely, "that said Raphael was not made a party to said ancillary bill of complaint, that he is not mentioned therein, that his claim is not referred to therein and that he has never taken any part in any hearings thereon" (R. 37, par. No. 12).

2. The Petition for Contempt Filed by the Receiver, and the Disposition Thereof By a Consent Decree Allowing Drake and Buff to Pay the Judgment in Instalments Over a Period of More Than Three Years.

On October 7, 1931, the receiver filed in the United States District Court a petition against said Buff and Drake as respondents seeking to have them adjudged in contempt for failing to pay the judgment and execution which had been issued against them by said court on July 16, 1931 (R. 21 to 26). Said contempt petition charged that Drake had taken a false oath with respect to the item in his affidavit concerning the amount of tax titles (R. 22, par. No. 8). It also charged that Buff and Drake had attempted, through the medium of a credit adjustment agency, to buy off the claims of the creditors at 15%, instead of paying them the thirty per cent as promised in said offer and said bond (R. 23, par. No. 14). Copies of two letters sent by the agency urging creditors to accept 15% are set forth in the record (R. 24-26).

In the contempt petition, the receiver alleges on information and belief that Buff and Drake "are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and

under their control assets of which they are the actual owners, sufficient to satisfy in full the judgment" (R. 23-24, par. No. 15).

No evidence was heard on said contempt petition, and again, as they had done in the final decree on the ancillary bill (R. 20), Buff and Drake assented to an order (R. 26 and 27). This order, dated October 21, 1931, requires them to pay $1,000.00 per month to the receiver until the execution is satisfied. It also appears by the order that the W. E. Noyes Co. (the corporation formerly known as Monroe Stores Corporation which Buff and Drake had organized in December, 1930, to take over the assets purchased in Dempsey's name), had already gone into bankruptcy, and that Dempsey, Drake and Buff held a claim or claims against that bankrupt corporation, which they agreed, by said order on the contempt petition, to assign to the receiver (R. 26).

This respondent respectfully calls attention to the fact that he was not a party to said contempt petition, that he received no notice of any proposed hearings or proceedings thereon, and "has never taken part in any hearings" thereon (R. 37, par. No. 12).

D. THE PROCEEDINGS IN THE DISTRICT COURT ON THE RETURN OF THE ORDER OF NOTICE ISSUED ON THE RECEIVER'S MOTION TO ENJOIN THE STATE COURT SUIT.

The above details as to the ancillary bill and the contempt petition came to the notice of counsel for this respondent, when the State Court suit was suddenly brought to a halt by the service on respondent's counsel of said order of notice issued on the receiver's motion for an injunction. No service of said order was made upon this re-

spondent, who is and for many years has been a resident of New Britain, in the County of Hartford, in the State of Connecticut (R. 33 and 37, par. No. 13).

Counsel "appearing specially" for the respondent, filed a plea to said receiver's motion (R. 33 to 50). The plea was under oath. It set forth what had occurred in the receivership proceedings and in the State Court suit. There was no dispute as to these statements in the plea. The stipulation in the record shows that they were true (R. 3, par. 1). The hearing that was had on the return day of said order of notice appears by the stenographic transcript (R. 51 to 59). The stenographic record shows that no evidence was offered by the receiver in support of his motion, and that there was no evidence before the court other than the documents annexed to the plea, and said sworn plea, the allegations of which, with respect to all the proceedings both in the State Court and in the Federal Court are true, as appears by the stipulation of the parties (R. 3, par. 1).

In his argument on said motion, counsel for the receiver admitted that a balance of $9,300.00 of the principal amount of $10,500.00 was "now due" to this respondent, and that the same "has been due for some time," and stated that the respondent "is entitled to his money without question" (R. 51 and 52).

After hearing the arguments, the District Court, on December 7, 1931, entered an order modifying the order of March 23, 1931 (which had permitted the respondent to bring proceedings on the bond), and enjoining the respondent from further prosecuting his suit in the Superior Court "except that the said Louis Raphael may proceed in said cause to judgment, but no further" (R. 59 and 60).

From said order, the respondent duly appealed to the United States Circuit Court of Appeals for the First Circuit (R. 60 and 61). In the majority opinion of the Circuit Court (R. 64 to 72), after a careful summary of the facts and of the issues presented by the appeal to that court, Bingham, J. considered the question "whether the District Court had, by reason of the receivership proceedings, such jurisdiction of the subject matter of the suit in the state court as to authorize it to issue an injunction restraining its further prosecution" (R. 68). Relying upon established principles and citing numerous authorities in support thereof, the majority opinion reaches the conclusion that the District Court was without jurisdiction to enjoin this respondent from proceeding with his suit in the State court against Dempsey, Drake and Buff *in personam* and from enforcing his attachments against their shares of stock and other individual property. The Circuit Court therefore found it "unnecessary to deal with the other points raised" in that court by this respondent (R. 72), and entered a decree reversing the order of injunction issued by the District Court against this respondent (R. 75).

The only authorities cited by the dissenting Judge in support of his opinion are Sec. 24 of the Judicial Code and two decisions, namely: *Howard vs. U. S.*, 184 U. S. 676, and *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349 (R. 72-74).

Points and Authorities.

I. THE SUIT PENDING IN THE STATE COURT IS AGAINST DEMPSEY, DRAKE AND BUFF IN PERSONAM AND THE FEDERAL COURT WAS WITHOUT JURISDICTION TO ENJOIN IT.

The suit in the state court, which has been pending for months, was clearly "one *in personam*," as the Circuit

Court says in its opinion (R. 69). It seeks to enforce the personal obligations assumed by Dempsey, Drake and Buff under the bond. It was commenced with the express approval of the District Court, and it has not even been argued that the jurisdiction of the state court did not properly attach. The District Court order which was reversed, expressly says, in referring to the state court suit, "that the said Louis Raphael may proceed in said cause to judgment" (R. 60). It was thus clearly recognized that the state court suit had been properly begun and prosecuted by this respondent.

Section 265 of the Judicial Code (28 U. S. C. A., sec. 379), provides,

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It has been clearly said by the United States Supreme Court that, unless a case falls within the recognized exceptions to this express statute, "a federal court sitting in equity * * * lacks the power to stay an action in the state court."

> *Riehle v. Margolies*, 279 U. S. 218 at 228; 49 S. Ct. 310 at 314.

In speaking in that case of the issuance by a Federal Court of an injunction to enjoin a pending state court suit, Mr. Justice Brandeis, says at p. 223,

> "the rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached the right cannot be restrained by proceedings in any other court, applies to protect the

jurisdiction of the court unless the case is within some recognized exception to sec. 265 of the Judicial Code."

It is well settled that an action *in personam* pending in a state court is not within the recognized exceptions and cannot be enjoined by a federal court.

Kline v. Burke Construction Co., 260 U. S. 226; 43 S. Ct. 79.

Riehle v. Margolies, ubi supra.

Baltimore & Ohio Ry. Co. v. Wabash Rd. Co., 119 Fed. 678 (C. C. A.).

W. E. Stewart Land Co. v. Arthur, 267 Fed. 184 (C. C. A.).

In *Kline v. Burke Construction Co., ubi supra,* the Supreme Court, speaking by Mr. Justice Sutherland, says at p. 229,

> "It is settled that where a Federal Court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal Court the possession or control, actual or potential, of the *res*, and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal Court already attached. * * *

(at p. 230):

> "* * * But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in

> which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

This principle has been expressly applied in suits against purchasers of assets from a Federal receivership. Where the purchaser of the assets of a corporation held by a Federal receiver agreed to pay the debts of the corporation, an action brought in a state court by a creditor of the corporation against the purchaser upon that obligation to pay, has been held to be a suit *in personam* and not to be subject to injunction by the Federal Court.

Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

Railroad v. Manton, 164 U. S. 636, 17 S. Ct. 216.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43.

Western Union Tel. Co. v. U. S. Trust Co., 221 Fed. 545.

Ex parte Equitable Trust Co., 231 Fed. 571, 591.

International Great Northern Ry. Co. v. Binford, 10 F. (2) 496. Cert. denied, 273 U. S. 694, 47 S. Ct. 91.

Magid v. Westmoreland, 15 F. (2) 884. aff. in 15 F. (2) 885.

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263 F. 237 and 278 F. 832.

In re Kanter & Cohen, 121 Fed. 984.

U. S. Mort. Co. v. Mo. Ry. Co., 269 Fed. 497; cert. denied, 41 St. Ct. 538, 256 U. S. 699.
Lassiter v. Norfolk Ry. Co., 79 S. E. 264.

In Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337, the Trust Co. was a creditor of the Kansas City Suburban Belt Railroad Co. A receiver was appointed by the Federal Court upon a proceeding in equity to foreclose a mortgage on that railroad. A reorganization committee purchased the railroad from the receiver and turned it over to a new corporation called the Kansas City Southern Railway Co. The decree of foreclosure contained the usual provisions that the purchaser should pay the cost of foreclosure, the receiver's liabilities, and such claims as should be adjudged "prior in lien or superior in equity to the mortgage foreclosed herein upon the property sold." Thereafter, the Trust Co. brought suits at law in the State Court of Missouri claiming personal judgments against the Southern Railway Co. on the ground that the latter had become obligated to pay the Trust company's claims against the Kansas City Suburban Belt Rd. Co. but not because those claims were "prior in lien or superior in equity to the mortgage." Thereupon the Southern Railway Co., by an ancillary bill in the Federal receivership proceeding, obtained an injunction in that court prohibiting the Trust Co. from prosecuting the suits in the State Court. The Trust Co. appealed. The Circuit Court of Appeals, in reversing the order for the injunction, said at p. 341:

> "* * * The actions at law are founded upon no lien and upon no claim of lien upon any of the property mortgaged and sold under the decree of the court below. They rest upon the single claim that the Southern Company has both impliedly and expressly promised

to pay the claims which they disclose to the trust company and the only relief which the latter seeks in them is a general judgment that it may recover the amount of these claims from the Southern Company. How, then, can these actions in any way invade the exclusive jurisdiction, or impeach the decree of the court below or the title of the Southern Company thereunder. * * *"

(At p. 342):

* * *" The actions at law here under consideration are against the purchaser, and they rest upon its independent liability, not upon that of the mortgagor, and the lien of the levies under the judgments, if any should be rendered therein, will be neither prior in right nor superior in equity to the lien of the mortgage, but will be effective only because the debtor, the Southern Company, has acquired the title to the property and has thereby made it liable for its personal obligations. When a judgment debtor takes title to property which he buys at a foreclosure sale or otherwise, the judgment against him immediately settles upon it. When a debtor buys such property it becomes liable to be seized under any judgment that may be subsequently rendered against him."

(At p. 343):

* * * "Our conclusion is that the order for a temporary injunction herein was improvidently granted because an action for a personal judgment against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was incorporated and under which it bought the property is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage, nor an impeachment of the decree or of the title thereunder."

This case is cited with approval in *Kline v. Burke Construction Co.*, 260 U. S. 226 at 231, 43 S. Ct. 79 at 81.

In *Western Union Tel. Co. v. U. S. Trust Co., ubi supra,* the Western Union Co. was a creditor of the Kansas City, Mexico & Orient Railway Co. A receiver was appointed by the Federal Court in a proceeding in equity to foreclose a mortgage on that railway. After the sale the Western Union Co. and other creditors brought suit in the State Court of Kansas against the purchaser at the foreclosure sale. The Federal Court enjoined the State Court suits. The Circuit Court of Appeals, in reversing the order for the injunction, said, by Sanborn, J. at p. 555,

> "The prosecution or threatened prosecution in other courts by creditors of a mortgagor of actions *in personam* against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under him, upon alleged promises or legal liabilities made or incurred by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, title, or interest in the specific property in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree."

Another case bearing strongly on the case at bar is *International-Great Northern Rd. Co. v. Binford, ubi supra.* There the International and Great Northern Rd. Co. had gone into the hands of an equity receiver appointed by the United States District Court, and its property was sold by the receiver under a foreclosure decree to a new corporation organized for that purpose. The decree of sale provided that the property was sold subject to claims prior in equity to the mortgage. Thereafter, the Concrete Company, a creditor of the old railroad company, whose claim accrued for current expenses of operation within two years of the receivership, sued the purchaser in the Texas State Court,

on the ground that the purchaser was charged with the payment of the debts of the old company and on the ground that a fraud had been practiced by the purchaser, in that stockholders of the old company received benefits from the organization of the new company and from the purchase by it, whereas no provision was made for claims such as this creditor held. That suit, in the Texas Court, resulted in a judgment for the creditor. Thereupon the purchasing corporation (or rather its successor), brought a bill in the United States District Court to enjoin the sheriff from enforcing the judgment. The District Court denied the prayer for injunction. In affirming this denial, the United States Circuit Court of Appeals for the Fifth Circuit said at p. 498:

> "* * * The suit brought by the Concrete Company did not assert a claim that the debts it held were chargeable against the property sold under the abovementioned decree when title to that property was acquired by the purchaser at such sale. * * * The other claim asserted in the suit brought by the Concrete Company likewise was based on alleged transactions subsequent to the acquisition of title to the property by the purchaser at the sale under the court's decree. In our opinion that suit did not involve controversies which were ancillary and dependent on the receivership and foreclosure suit. The rule as to the ancillary jurisdiction of a court to deal with claims in respect of property there impounded was stated and applied in the case of *Central Union Trust Co. v. Anderson County*, 268 U. S. 93, 45 S. Ct. 427. The statement of the jurisdiction by no means indicates that it has such a scope as to enable a court to draw to itself the determination of any claim of an interest in or a charge upon property impounded which did not come into existence until after the court surrendered custody and control and after the owner through the sale of the property under the court's decree was free to subject it to liability.

> * * * The claims sought to be brought before the court for adjudication by the proceeding instituted by the appellants were not within the ancillary jurisdiction which was invoked, as they did not accrue until after the sale under the court's decree of the property affected by them."

In the case at bar the District Court parted entirely with all the assets of the Monroe Stores, Inc., over which the receiver had been appointed, and did not, by the decree of sale or otherwise, retain jurisdiction to itself to determine all future litigation against the purchaser of the assets.

This respondent is seeking, in the State Court, merely a judgment *in personam* against the purchaser and the two sureties. No right, lien or other interest in the specific property that was turned over by the Federal Court to the receiver is sought in the State Court. The property that has been attached and which is sought to be reached and applied in the State Court never belonged to the Monroe Stores, Inc., and never was in the possession of the receiver, namely, mortgages, certificates for shares of capital stock, real estate and bank deposits belonging to Buff and Drake personally. That property was attached in the State Court on April 9, 1931, when the State Court proceedings were begun (R. 34, par. No. 4), and thereupon came within the prior jurisdiction of the State Court.

II. THE FEDERAL COURT INJUNCTION RESTRAINING THIS RESPONDENT FROM ATTEMPTING TO ENFORCE THE LIENS OBTAINED BY HIM IN THE STATE COURT SUIT CANNOT BE JUSTIFIED ON THE GROUND THAT HE MIGHT THEREBY OBTAIN A PREFERENCE.

The dissenting judge in the Circuit Court of Appeals justified the injunction on the ground that the respondent

might "obtain a preference" by the enforcement of the State Court attachments (R. 73). The receiver has also attempted to justify the injunction on the ground of preference. This respondent respectfully submits that an examination of the record shows that the injunction was not warranted on any such basis.

Drake and Buff were not and are not in bankruptcy. Nor is there anything in the record showing that they were or are insolvent. On the contrary, the record shows that they are amply solvent.

A. The Record Shows That Drake and Buff Are Solvent.

Their total obligations under the bond aggregated less than $35,000 in amount (R. 15 par. No. 4). Less than five months before the State Court suit was commenced, they had filed the sworn affidavit showing that Buff's net worth was "not less than six hundred thousand dollars ($600,000.00) over and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property" (R. 7). Drake's net worth at that time was "not less than one hundred fifty-eight thousand two hundred fifty-five dollars ($158,255.00)" (R. 5). Thus the aggregate net worth of the sureties was in excess of seven hundred and fifty thousand dollars ($750,000.00), only five months before the State Court suit was commenced.

The record further shows that the receiver himself alleged on October 7, 1931, when he filed the contempt petition against Drake and Buff, that they

> "are financially able to pay the full amount of the judgment rendered against them in this cause and have

> in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment" (R. 23-24 par. No. 15).

This statement as to the financial standing of Drake and Buff was made by the receiver only two months before the District Court enjoined the State Court suit, and several months after the State Court attachments had been made.

Furthermore, on October 5, 1931, the master filed his report showing that Drake and Buff were possessed of large amounts of property, many times in value the amount of the obligations under the bond (R. 46 to 48, pars. Nos. 18 to 28). It appears by the record that they were the owners of a substantial number of shares in various corporations. The receiver has stated in his brief in this court that these shares of stock consisted of "unlisted stocks of relatively small business concerns" (Petitioner's brief, p. 10). But there is nothing in the record to support this assertion that the corporations that had issued these shares of stock were "relatively small business concerns." For example, it appears that Buff owned stock of the par value of $150,000.00 of the Henrici Laundry Machinery Co.; that he owned first preferred, second preferred and common stock of the Babson Dow Mfg. Co. and that he owned "a large number of shares of the capital stock" of Buff & Buff Mfg. Co.

As to Drake it appeared that he owned 100 preferred shares of Mullins Manufacturing Co. and since the receiver has made the assertion about "relatively small business concerns" it perhaps warrants this respondent in pointing out that the preferred stock of the Mullins Manufacturing Co. is and has been listed on the New York Stock Exchange for a long time.

The master also found that Drake holds a large number of tax titles standing in the names of various nominees who have executed deeds thereof to him and that "there are no mortgages on any of the parcels, except the last four parcels set forth in the schedule" (R. 47 and 48, pars. numbered 26 and 27). The master further found that Drake has "deposits of money to his personal credit" in three banks and that "he has various mortgages on real estate aggregating in amount approximately $150,000" (R. 48, par. No. 28). In this connection, this petitioner calls to the court's attention that the receiver, in his brief, speaks of these as "second mortgages" (Petitioner's brief, p. 10), but there is nothing in the record to warrant the statement that these mortgages were "second" mortgages, and this respondent says that this assumption as to "second" mortgages made in the receiver's brief is entirely unwarranted.

It is, therefore, clear on the record that it cannot be said that Drake and Buff were insolvent.

B. The Assertions in the Receiver's Brief as to the Insolvency of Drake and Buff are Unwarranted by the Record.

Being faced with this record as to the financial condition of Buff and Drake, the receiver now attempts, by means of further unwarranted assertions not borne out by the record, to persuade this court to conclude that the facts were otherwise than the record shows. He says in his brief:

> "It then (after the filing of the contempt petition) appeared that perhaps the sureties, Buff and Drake, had misrepresented their true wealth, and that the actual cash value of whatever assets they did possess was far less than the figures to which they had attested in their affidavits" (Petitioner's brief, p. 10).

The receiver does not vouchsafe any reference or information as to when, where and to whom this alleged information "appeared," or how far the "perhaps" bore on the fact of their insolvency. Nor does the record show that any such information "appeared." Buff, having stated in his affidavit that his net worth was not less than $600,000.00 (R. 7), might still be amply solvent even if it could be assumed that his affidavit misrepresented the value of his assets to some extent. But, of course, an assumption to such effect, cannot be made, as it would mean an assumption that Buff had committed perjury.

Proceeding further with this unwarranted assumption, the receiver repeats this bald assertion as to misrepresentation on page 12 of his brief, and there leaves out the word "perhaps." He there says boldly, as if it had been warranted by due allegation and proof, that "the sureties, Buff and Drake, had misrepresented their true wealth, and whatever assets they did possess are of questionable value under present conditions" (Petitioner's brief, page 12). This respondent says that there is absolutely nothing in the record to warrant this charge that Buff had committed perjury in his affidavit, and that the injunction of the District Court cannot be sustained on the basis of this bald assertion now made as to Buff for the first time in the brief filed by the petitioner in this court.

To bolster up his argument, the receiver in his brief in this court, also makes other large assumptions of fact, all without warrant in the record. He says as follows on page 10 of his brief:

> "It is a matter of common knowledge in these days, that equities in real estate are practically wiped out,

> that second mortgages are of no actual value and that unlisted securities in small businesses have no cash value, regardless of what the par value of the stocks may be" (Petitioner's brief, p. 10).

It is clear that there was no evidence to support any of these sweeping assumptions which the receiver's counsel asks the court to make. The respondent respectfully submits that these assertions of the receiver's brief are not in accord with fact and are entirely unwarranted; that such assumptions could only come within the purview of judicial notice, if ever, at a time when the financial structure of the country is in utter and hopeless ruin.

The receiver further includes in his brief some personal prognostications as to what would have occurred if the property of Buff and Drake were offered for sale. These assumptions are not based on the record and the receiver does not state in his brief what he does base them on. He says:

> "If these properties were actually sold, they would realize only a small fraction of their par value and their face value. There would be hardly enough to satisfy the individual claim of the respondent, Raphael, and the other creditors, and the receiver might be forced to go begging" (Petitioner's brief, p. 10).

Again on another page of his brief the receiver says:

> "As a practical result the respondent, Raphael, will obtain an inequitable preference to the disadvantage of the other creditors and the receiver, for the assets will have been exhausted, leaving an empty obligation on the bond" (Petitioner's brief, p. 12).

On still another page of his brief, the receiver says:

> "If this action, (the State Court suit) were allowed to continue to execution and the sale of the sureties' assets, which were attached therein, it would probably have resulted in an inequitable preference to Raphael at the expense of the other creditors" (Petitioner's brief, pp. 25 and 26).

These prognostications by the receiver's counsel as to the amount that could be realized if the properties of Drake and Buff were sold, are certainly pure speculations. He cites no authority for his opinions in that regard, and these speculations certainly cannot stand in the place of proof that is lacking.

C. No Question of Preference is Involved in the Absence of Bankruptcy.

Moreover, even if Drake and Buff were insolvent, there would be nothing unlawful, in the absence of bankruptcy, in their being compelled to pay this respondent the amount due him according to the master's report out of the proceeds of the sale of their assets.

Marberry v. Brooks, 7 Wheat. 575.
Estes v. Gunter, 122 U. S. 450; 7 S. Ct. 1275.
Halsey v. Fairbanks, 4 Mason 206.
Banfield v. Whipple, 14 Allen 13.
Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co., 245 Mass. 69.

In *Marberry v. Brooks, ubi supra,* Chief Justice Marshall says at p. 577,

> "That a debtor has a right to prefer one creditor to another cannot be denied."

In *Halsey v. Fairbanks, ubi supra,* Mr. Justice Story says at p. 212,

> "A creditor may be defeated or delayed in the satisfaction of his debts by a *bona fide* conveyance of a debtor's property, either on a sale or by a preference to another creditor. Such a conveyance is not rendered void by such effect, whether it be intentional or not."

In *Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co., ubi supra,* Chief Justice Rugg of the Massachusetts court says at p. 73,

> "In the absence of any inhibiting statute, a debtor commits no fraud by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. * * * It is settled at common law that a debtor has a right to prefer one or more of his creditors over others."

It is thus clear that the question of preference can arise only in bankruptcy. But in the case at bar, even if there had been bankruptcy, the attachments obtained by this respondent in his State Court proceedings could not be invalidated on the ground of preference. Those attachments were made on April 9, 1931, when the State Court proceedings were commenced and this was more than four months before the District Court issued the injunction and also more than four months before the contempt petition against Drake and Buff was filed.

It is therefore respectfully submitted that the majority opinion of the Circuit Court of Appeals is right in saying that "no question of preference by Raphael over the other creditors is involved" (R. 71).

III. THE INJUNCTION RESTRAINING THE RESPONDENT FROM ENFORCING THE STATE COURT ATTACHMENTS CANNOT BE JUSTIFIED ON THE GROUND THAT THE RECEIVER HAD ANY LEGAL RIGHT OR INTEREST IN THE PROPERTY ATTACHED, FOR THE RECEIVER NEVER HAD POSSESSION OF ANY OF THE ATTACHED PROPERTY; NOR DID THE STATE COURT ATTACHMENTS INTERFERE WITH ANY FEDERAL COURT LIEN OR ATTACHMENT THEREON.

In the State Court suit, this respondent attached, and by the form of final decree submitted by him to the Superior Court, seeks to reach and apply, to the satisfaction of his claim, certain specified shares of stock, mortgages, real estate, and bank deposits of Drake and Buff (R. 28 to 31). The master has found that they are individually the owners of each of these respective items (R. 46 to 48, pars. Nos. 19 to 28 incl.). None of the property so attached constituted any portion of the assets of Monroe Stores, Inc., and none of it has ever been in the receiver's possession. The receiver is an absolute stranger to that property, and does not even so much as claim any right to the title or to the possession of any of the property under attachment. It is thus clear that the injunction cannot be justified on the ground that the enforcement of the respondent's attachments would have interfered with any property in which the receiver had any interest.

Nor can it be said that the property under attachment was in any way under the control of the District Court. It is true that on the ancillary bill, the District Court issued, on May 4, 1931, four preliminary injunctions each restraining the transfers of property by Drake and Buff, "until the further order of the court" (R. 18-19). As it appears, however, that the State Court proceedings to reach and apply had been filed previously and that pre-

liminary injunctions had already been issued and attachments made in those proceedings (R. 36, par. 9), it is clear that those preliminary injunctions issued by the State Court created valid equitable liens in favor of the respondent, just as the attachments created legal liens.

Snyder v. Smith, 185 Mass. 58.
Rioux v. Cronin, 222 Mass. 131.
Metcalf v. Barker, 187 U. S. 165, 23 S. Ct. 67.

In *Rioux v. Cronin, ubi supra,* Rugg, C. J. says at p. 137,

> "The filing of such a bill under the statute (a bill to reach and apply), accompanied by the issuance of an injunction, does create a lien in favor of the creditor."

In *Metcalf v. Barker, ubi supra,* the U. S. Supreme Court, in considering a bill by a creditor, says at p. 172 that the lien created by the filing of such a bill "is a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected."

Even if those subsequent injunctions of the District Court were still outstanding, they therefore could not affect the valid liens on the property covered by the prior State Court attachments and injunctions.

In *Kline v. Burke Construction Co.,* 260 U. S. 226, 43 S. Ct. 79, the U. S. Supreme Court says at p. 229:

> "It is settled * * * that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction."

In *Covell v. Heyman,* 111 U. S. 176, 4 S. Ct. 355, the Supreme Court in referring to that principle, says at p. 182:

> "It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

However, the record clearly shows that the injunctions of the Federal Court are no longer outstanding. Having been issued on May 4, 1931, on the ancillary bill (R. 18 to 20), they were followed on July 16, 1931, by a consent final decree on that bill, which merely ordered a personal judgment and execution and nothing more (R. 20). The preliminary injunctions of the Federal Court were thus dissolved by its own final decree.

Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th).
Musgrave v. Staylor, 36 Md. 123.
Jackson v. Bunnell, 113 N. Y. 216.
Gardner v. Gardner, 87 N. Y. 14.

In *Sweeney v. Hanley, ubi supra,* the U. S. Circuit Court of Appeals for the ninth circuit says at p. 99, that the temporary injunction in that case had "come to an

end by the entry of the final decree in the cause making no provision for any injunction."

In *Gardner v. Gardner, ubi supra,* there was a proceeding for contempt of a temporary injunction entered in a divorce suit restraining the defendant from conveying or encumbering his property, until the further order of the court. It appeared that the final decree in that case provided for alimony and a bond, but said nothing about the injunction. Some time after the final decree, the respondent in that case did convey and encumber his property, and the lower court ruled that he was guilty of contempt. On appeal, the New York Court of Appeals reversed the decision, and said at p. 17:

> "This (the final decree) certainly disposed of the injunction, and *provided for* an allowance in its place for the plaintiff's maintenance and support. * * *"

(At p. 18):

> "There can be no question that the injunction was abrogated by the judgment * * * the final judgment was the further order of the court."

It is thus clear that there is no valid Federal Court attachment or lien affecting any of the specific property of Buff and Drake which is subject to the attachments in the State Court suit, and that the injunction which prevents the respondent from enforcing the State Court attachments cannot be justified on the ground that the property of Drake and Buff was in the custody of or under the control of the Federal Court.

IV. THE STATE COURT ATTACHMENTS DID NOT INTERFERE WITH "THE ADMINISTRATION AND LIQUIDATION" OF ANY PROPERTY IN THE POSSESSION OF THE RECEIVER, FOR HE HAD CONVEYED TO DEMPSEY ALL THE PROPERTY OF MONROE STORES, INC., AND THEREAFTER HAD NO PROPERTY IN HIS POSSESSION. THE BOND WAS NEITHER IN HIS POSSESSION NOR WAS HE NAMED AS OBLIGEE THEREOF.

The receiver contends that the injunction which he obtained against the respondent was warranted because of continued responsibility "for the administration and liquidation of the estate" (Petitioner's brief, p. 13), and he says that "otherwise the orderly and equitable administration and liquidation of the receivership estate would be prejudiced" (Petitioner's brief, p. 17). He repeats this contention frequently in his brief.

But it seems clear beyond doubt that the injunction cannot be defended on the ground that the enforcement of the State Court attachments would interfere with "the administration and liquidation" of any property in the receiver's possession. The record shows that he had conveyed to Dempsey all the assets of Monroe Stores, Inc. "of every name, nature, character and kind" including even the cash (R. 10). So far as the creditors were concerned, he was thus relieved of the trust with respect to the assets that had come to his hands when he was appointed receiver. After the conveyance to Dempsey, the receiver held no assets in his possession, and there remained no property in his hands for "administration" or "liquidation" for the benefit of the creditors. So far as they were concerned, the receiver owed them no duties, and he was receiver in name only. The receiver was not discharged at that time, only because his fees and receivership obligations

remained to be paid. These, Dempsey had obligated himself to pay and Drake and Buff had guaranteed this obligation.

Bingham, J., in the majority opinion, summarizes the situation of the receiver concisely and forcibly as follows:

> "All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser rather than to the receiver for the payment of the dividends on their claims, all that remained for the court to do was to allow the claims of the creditors and settle the account of the receiver" (R. 69).

Now, as to the bond, we find by the record that not only was the receiver not named as the obligee thereof, but that it was not delivered to him and was never in his possession.

The record affirmatively shows this, for it appears that "said Harold F. Dempsey filed *in this court* a bond, etc." (R. 8, par. No. 2). The receiver himself admits that the bond never was in his possession, but was filed in court. He says in the contempt petition, as follows:

> "Dempsey was required to file a bond with the clerk of the United States District Court" (R. 21).

It is, therefore, clear that the injunction cannot be justified on the ground that any property in the possession of the receiver would be interfered with by a levy on the property attached in the State Court suit.

V. THE UNITED STATES OF AMERICA HAD NO BENEFICIAL INTEREST IN THE BOND, IT WAS ONLY A FORMAL OBLIGEE THEREIN. THOSE ENTITLED TO THE BENEFITS SECURED OR "GUARANTEED" BY THE BOND ARE THE REAL PARTIES IN INTEREST AND ARE ENTITLED TO ENFORCE IT.

The receiver asserts in his brief as follows:

> "The possession of this bond and control of its enforcement are both in the District Court, and the sole right of suit is vested in the receiver. An individual creditor, if he can sue on the bond at all, can only do so after obtaining permission from the court itself" (Petr's Brief, p. 8).

He repeats this assertion frequently in his brief, and he attempts to support it by the cases of *U. S. F. & G. Co. v. Kenyon,* 204 U. S. 349, and *Illinois Surety Co. v. U. S.,* 226 Fed. 665.

But it is respectfully submitted that neither the record in the case at bar nor the cases relied upon by the receiver give any support to his position in this regard.

The bond, filed in court in pursuance to the offer, obligates Dempsey, Drake and Buff "to the United States of America," as obligee, not to the receiver. The purpose of the bond is expressly stated therein to be that of "guaranteeing the performance of the conditions and terms of said offer" (R. 13). Obviously the United States was named as obligee in the bond, not because it was to receive any benefits under the offer. The United States is not mentioned as a beneficiary in the offer. It was neither a stockholder nor a creditor of Monroe Stores, Inc., and had no financial interest in its affairs. The United States was named as

obligee in the bond, merely for the benefit of those beneficially interested in the obligations, the performance of which the bond guaranteed.

Three distinct sets of parties are respectively named in the offer as the beneficiaries of Dempsey's several obligations thereunder, to wit:

a. the creditors—who are each to receive thirty per cent "in or within thirty days after their claims have been duly approved and allowed" (R. 10, par. No. 1).

b. the receiver—whose liabilities for "merchandise, administration expenses, counsel fees, etc." Dempsey was to pay, to an extent not exceeding $20,000.00 (R. 11, Par. No. 2).

c. the stockholders of The Monroe Stores, Inc.—who each had a right to purchase on or before January 15, 1931 preferred stock of the new corporation "upon payment of $10.00 per share for said preferred stock of said aforesaid corporation and receive five shares of Class A stock of the aforesaid corporation for each share of the preferred stock of the aforesaid corporation acquired by them." (R. 12, Par. No. 5.)

The bond was for the purpose of "guaranteeing the performance" to be made by Dempsey of these three distinct and separate obligations. For example, the shares of Class A stock of the new corporation were to come directly to those stockholders of Monroe Stores, Inc. who entitled themselves thereto by buying preferred stock. The certificates for the Class A stock were not to be delivered to the receiver. The receiver had no interest in that. The obligation as to the Class A stock was not an obligation for the receiver's benefit. Each such stockholder had a

right to have performance of that promise made directly to him.

Likewise, the obligation as to the thirty per cent was an obligation clearly for the benefit of the creditors, not of the receiver. These thirty per cent payments were to come from Dempsey, not from the receiver, for he had conveyed to Dempsey all "the assets of every name, nature, character and kind" (R. 13) including even the cash. Nothing remained in the hands of the receiver for distribution among the creditors. The only obligation assumed by Dempsey in the offer, in which the receiver then had any interest, was the obligation to pay the fees, the administration expenses and "any and all liabilities of the receiver." (R. 11, Par. No. 2.) That was the only obligation which the bond guaranteed for the receiver's benefit.

A. The District Court Has Recognized the Obligation of Dempsey to Make Payment Directly to the Creditors.

The District Court recognized Dempsey's obligation to pay directly to the creditors and that a creditor has a right to enforce said bond for breach of this obligation, for, on March 23, 1931 it granted this respondent's petition for leave to institute such proceedings thereon (R. 7-10). Even in the order enjoining the respondent, the District Court has not denied the respondent's right to sue on the bond, for that order says affirmatively that the respondent "may proceed in said cause to judgment" (R. 59 at p. 60.)

B. Dempsey, Drake and Buff Have Themselves Acknowledged Their Obligation to Make Payment Directly to the Creditors.

In March, 1931, when the respondent demanded performance of the obligation to pay thirty per cent and when

twelve hundred dollars was paid to him on account, this payment was made not to the receiver or through the receiver, but directly to the respondent. (R. 33 and 34, par. 2.) Furthermore, the fact that Drake and Buff attempted to buy the claims of creditors for fifteen cents on the dollar (R. 24, 25 and 26), shows that they considered that the payments on the creditors' claims were to be made directly to the creditors, not to the receiver. Again, in their answer to paragraph No. 4 of the bill brought by this respondent in the State court, Dempsey, Drake and Buff expressly admitted the allegation that the thirty per cent were "to be paid to creditors." (R. 42.)

C. The Receiver Himself Has Recognized That Dempsey Was Obligated to the Creditors to Make Payments Directly to Them.

The ancillary bill filed by the receiver's counsel does not allege that the receiver is entitled to collect the thirty per cent. On the contrary, the ancillary bill alleged that the $34,856.14 sought to be recovered therein was the aggregate sum "due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors who have filed their claims, and which claims have been allowed by this court*" (R. 15, par. No. 4). Furthermore, the ancillary bill did not pray for an order that these sums be paid to the receiver. The prayer of the ancillary bill is that Dempsey, Drake and Buff be ordered to pay the same "to the clerk of the United States District Court." For whose benefit was the clerk to hold this money? The prayer of the ancillary bill says "for the use and benefit [a] of the receiver of the Monroe Stores, Inc. [b] the creditors of the receiver and [c] the creditors of The Monroe Stores, Inc." (R. 17 and 18, prayer No. 2.)

Again in the contempt petition, the receiver says expressly "* * * * said offer, in substance, provided that Harold A. Dempsey would *pay to the creditors* of The Monroe Stores, Inc., thirty per cent of the claims approved and allowed by this court" (R. 21, par. No. 3). After referring to the bond as having been given to secure the performance of said obligation to "*pay to the creditors,*" the receiver's contempt petition alleges as the breach of said obligation, the failure of Dempsey, Drake and Buff "to pay *to the creditors* of The Monroe Stores, Inc. thirty per cent of the amount of their claims." (R. 22, par. No. 9.) In another paragraph the contempt petition charges that Buff, and Drake "have been and now are attempting to avoid the payment of *their obligations to the creditors of The Monroe Stores, Inc.*" (R. 23, par. No. 13.) Furthermore, in referring in said petition to the attempts, by Buff and Drake, to buy the claims of creditors at fifteen cents on the dollar, the receiver alleges that said attempts were "in violation of their obligations in an agreement with this court *to pay said creditors* thirty cents on the dollar." (R. 23, par. No. 14.)

Moreover in the brief filed by the receiver in this court, he expressly admits that, for he says: "even though the obligation of the purchaser [Dempsey] under the terms of the offer runs directly to the individual creditors, as the respondent maintains * * * " (Petitioner's Brief p. 17).

The receiver himself has thus recognized and asserted that Dempsey, Drake and Buff were under obligation to the creditors to make payment directly to them.

It thus appears, not only by the terms of the offer, the performance of which the bond guaranteed, but also by the

positions taken by all concerned, including the District Court, the offeror and the sureties on the bond, and the receiver that the receiver was not to collect the thirty per cent payments on the creditors' proofs of claim, but that those payments were to be made by Dempsey, Drake and Buff directly to the respective creditors.

This direct obligation to the respondent as a creditor was one of the obligations which the bond is expressly "guaranteeing." It seems clear that as the beneficiary of Drake's and Buff's undertaking to guarantee that obligation, the respondent is in the same position as is a creditor in a probate estate with respect to the bond of the executor or administrator, or a creditor of a bankrupt estate with respect to the bond of the trustee in bankruptcy.

It has been held that suits upon bonds of trustees in bankruptcy and upon bonds of executors and administrators may be brought without leave of court.

Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278.
Alexander v. Union Surety & Guaranty Co., 85 N. Y. S. 282, 11 A. B. R. 32.
United States, ex rel., v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.).

2 Remington on Bankruptcy, 3rd Ed. Sec. 1090, p. 441 Remington says:

> "Suits upon trustee's bonds properly are brought in the name of the United States and no leave of court is necessary * * *. It has been held that such action may be brought in the United States District Court; also in the State court."

In *U. S. v. Ruggles, ubi supra*, the United States Circuit Court of Appeals, in a suit on a bond of a trustee in bankruptcy, says at p. 92:

"It has been held that it could be brought in the State court as well as in the Federal court."

In *Alexander v. Union Surety & Guaranty Co., ubi supra,* the New York court, in considering a similar case, says at p. 34:

"We have no doubt the action can be maintained in a State court, but only in the name of the United States. * * * Nor do we think it is necessary that permission be obtained to bring an action before one can be maintained under this statute, provided it be brought in the name of the United States."

In *Maryland v. Baldwin, ubi supra,* the United States Supreme Court, in a suit on an administrators' bond, says at p. 278:

"* * * the state is only a formal plaintiff, the actual litigation being between the other parties. By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

This language of the Supreme Court is fully applicable to the case at bar, for here also the bond was "held for the security of persons interested." In a suit on the bond, the name of the United States "is used from necessity," but "the real controversy" is between the respondent "and the obligors on the bond."

It therefore seems clear that there was no legal necessity for the respondent to obtain leave from the District

Court to sue on the bond. But if leave was necessary, it was obtained; and furthermore, the record shows that this was done "with his [the receiver's] knowledge," (R. 34, par. No. 3), and that he, at that time raised no objections and made no move to indicate that he claimed any right to interfere.

The receiver relies on the case of *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349; 27 S. Ct. 381. But that case has no bearing on the case at bar, for in the *Kenyon* case, as the majority opinion of the Circuit Court of Appeals points out, "the United States had an interest in the bond and was a real party plaintiff." (R. 72). There, the United States was itself a party to the contract for the construction of a public building, in pursuance to which contract the bond there in question was given. It was therefore financially interested in obtaining proper materials and labor for the erection of that building and the bond guaranteeing the payment of material men tended to assure a supply of such materials.

In the decision in the *Kenyon* case, Mr. Justice Harlan says at p. 356,

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government as involved in the construction of public works will be subserved, if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end, Congress may have deemed it important to assure those who furnished such materials and supplies that the Government would exert its power directly for their own protection."

The *Kenyon* case, therefore, has no bearing on the case at bar.

Likewise, the case of *Illinois Surety Co. v. United States,* 226 Fed. 665, also fails to lend any support to the receiver. In that case, the LaSalle Street Trust Co. and Savings Bank had filed a bond with the United States in the penal sum of fifty thousand dollars for the purpose of enabling the bank to act as depository of moneys of bankrupt estates. The bank became insolvent at a time when trustees in bankruptcy of various estates had deposits therein aggregating in amount in excess of one hundred sixty-five thousand dollars ($165,000.00). The Illinois Surety Co. was surety on the fifty thousand dollar ($50,000.00) bond filed by the bank. An action at law was brought by the United States for the use of certain trustees and receivers. It appeared clear that the penal sum of the bond was less than one-third of the aggregate claims thereon.

In the case at bar, however, the penal sum of the bond is one hundred thousand dollars ($100,000.00) and the aggregate of the obligations thereunder is less than thirty-five thousand dollars ($35,000.00). No question thus arises like the one that was presented in the *Illinois Surety Co.* case.

VI. AS THE RESPONDENT'S SUIT WAS MERELY TO ENFORCE AN OBLIGATION UNDER THE BOND, AND AS IT DID NOT INTERFERE WITH THE DISTRICT COURT'S PHYSICAL POSSESSION OF THE PAPER EVIDENCING THIS OBLIGATION, AND AS THE RECEIVER IS A STRANGER TO THE STATE COURT SUIT, HE HAS NO STANDING TO RAISE THE POINT AS TO WHETHER THE RESPONDENT HAD THE LEGAL RIGHT OR CAPACITY TO INSTITUTE A SUIT THEREON AGAINST DRAKE AND BUFF. IF THERE WERE MERIT TO THAT POINT, IT WAS OPEN TO DRAKE AND BUFF IN THEIR DEFENSE TO THE STATE COURT SUIT, BUT THEY DID NOT RAISE IT.

The physical paper called the bond is in the possession of the District Court. That paper is merely evidence of the obligations undertaken by Dempsey, Drake and Buff.

Sweetsir v. Chandler, 98 Me. 145 at 151.

The respondent's State court suit was to enforce one of the obligations evidenced by that paper. That suit did not interfere in any way with the District court's possession of that paper. The record shows that the respondent did not even have to introduce a copy thereof in evidence in the State court suit, for it appears that, in their answer in the State court suit, Drake and Buff expressly admitted "the giving of the bond". (R. 42). The record shows that the receiver does not even claim that the State court suit interfered in any way with the continued physical possession of the bond by the District court.

The receiver merely raises the point that Drake and Buff could not be held liable on their obligations under the bond except in a suit brought thereon by the receiver alone. Even if there were any merit to this point, it merely amounts to saying that Drake and Buff could interpose, on this ground, a successful defense to a suit brought by any other creditor to enforce their obligation under the bond.

But it is to be noted that this defence was not raised by Dempsey, Drake or Buff in the State court suit. The receiver is not a party to that suit, but a stranger thereto and he has no standing to raise this question. To permit a third party to raise in a separate proceeding a question as to the liability of a defendant in another suit, would certainly open up a new vista of possibilities for litigation without end.

The majority opinion of the Circuit Court of Appeals rightly says:

> "The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one *in personam* against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores." (R. 69).

The petitioner argues that the bond is a *res* and relies upon the case of *Dietzsch v. Huidekoper,* 103 U. S. 494 (Petitioner's brief, pp. 30-31). But in that case the bond was a replevin bond which is expressly conditioned on the return of the specific property and affects a *res.* Whereas in the case at bar the bond is purely a contract obligation for the payment of money. It is the same difference as that between a forthcoming bond in an attachment case and a bond to dissolve an attachment.

Smith v. Scott, 86 Ind. 346.

Ward v. Kent, 6 Lea (Tenn.) 128.

That a bond to dissolve an attachment is not the *res* nor a substitute therefor and has not the same incidents as attach to the property is well settled.

Carpenter v. Turrell, 100 Mass. 450.

Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 at 326.

Carpenter v. Turrell, ubi supra, was a case involving a bond to dissolve an attachment. In that case, Wells, J., says at p. 452,

> "The plaintiffs contend that the bond is a mere substitute for the attachment, and therefore that it should stand in all respects as its precise equivalent. But such is not the purpose of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment; it dissolves the attachment. It is, in many respects, a higher and better security for the creditor than the attachment. * * * The bond, although a substitute for the attachment, is not its equivalent, and has not its incidents."

Merely by virtue of being receiver, the petitioner cannot intercede himself into the issue as to the personal liability of Drake and Buff in the State Court suit.

In *U. S. Mortgage Co. v. Missouri Railway Co.,* 269 Fed. 497, the Circuit Court says at p. 501:

> "Where an attempt is made to take property out of his (receiver's) possession, then he is a proper party to litigation, and where relief is sought against 'his acts' as such receiver, he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. *Continental Trust Co. v. Toledo & C. Ry. Co.,* 82 Fed. 642, 646.
>
> The receiver does not represent the justiciable rights of the parties to the litigation of which he is the receiver, but only the protection of the property in his hands as such, or the collection of that to the possession of which, *as receiver,* he is entitled."

It is thus clear, as this decision says, that the receiver does not represent "the justiciable rights" of the respondent against Drake and Buff. He has no property in his hands, and is entitled only to receive from Drake and Buff his fees and receivership expenses. Other than that, the receiver has no standing or interest.

It is thus clear that there is no relationship between the receiver and the respondent, fiduciary, contractual or otherwise, and that the receiver is legally a stranger to the respondent, and to the State court proceedings.

VII. THE RECEIVER IS MERELY IN THE POSITION OF ANY OTHER CREDITOR OF DRAKE AND BUFF. AS SUCH CREDITOR, THE RECEIVER IS NOT ENTITLED TO ENJOIN SUITS AGAINST BUFF AND DRAKE BY OTHER CREDITORS.

The receiver is a beneficiary under the bond, only to the extent of the fees and the receivership debts which Dempsey, Drake and Buff obligated themselves to pay. That claim is based on a separate and distinct obligation, contained in a separate and distinct paragraph of the offer (R. 11, par. 2) from the obligation relating to the payment of the thirty per cent to the creditors (R. 10, par. 1). The creditors of Monroe Stores, Inc., have no interest in the receiver's fees or in the promised payments to extinguish obligations incurred by the receiver. A creditor could not maintain a suit against Dempsey, Drake and Buff for breach of that obligation. On the other hand, the receiver has no interest in the thirty per cent, which Dempsey obligated himself to pay directly to the creditors. To the extent of the thirty per cent of their approved claims, the creditors of Monroe Stores, Inc. became creditors of Dempsey and Drake and Buff under the bond filed for the purpose of guaranteeing the payment of those claims.

Being a stranger to the respondent and to his claim against Dempsey, Drake and Buff, and not being a party to the State court proceedings, and having no legal title or property right in any of the specific property of Drake and Buff sought to be reached and applied in those proceedings, the receiver is in the position of an unsecured creditor of Dempsey, Drake and Buff to the extent of his fees and receivership obligations which they became obligated to pay.

The receiver attempts to justify the injunction on the ground that the enforcements of the State court attachments might lessen the ability of Drake and Buff to pay his said claim. He made this the basis for his request for an injunction in the argument in the district court. He said:

> "If the Court permits the entry of the decree in the Superior Court it will handicap this Court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this Court as to the payment of the money except to put him in jail. I would rather have the money than put him in jail. That is my entire position in this case." (R. 52).

No evidence was introduced by the receiver in support of this claim that Drake and Buff did not have the financial ability to pay. The respondent vigorously denied this claim, and introduced the findings of the master that Drake and Buff had property worth many times the aggregate amount of all their obligations under the bond.

But even if the receiver's claim as to Drake and Buff's inability to pay could somehow be assumed to be true, in

the absence of evidence to support it, it is clear that it did not entitle the receiver to an injunction against this respondent.

McBride v. Little, 115 Mass. 308.
McGoldrick v. Slevin, 42 Ind. 522.
Victor v. Lewis, 53 N. Y. S. 944.

In *McBride v. Little, ubi supra*, the plaintiff brought a bill in equity to restrain Little from prosecuting to judgment a suit at law which the latter had brought against one Brooks. The bill alleged that the plaintiff was a creditor of Brooks for money loaned by him to enable Brooks to make a composition with his creditors, that Little was a creditor of Brooks and had accepted the dividend under the composition; that notwithstanding that acceptance, Little had brought suit against Brooks on the old indebtedness. Little demurred. The Massachusetts Supreme Court sustained the demurrer and said at p. 309,

> "If the plaintiff is a creditor of Brooks, this does not give him such an interest that he can enjoin a suit against Brooks. * * * *The mere fact that a judgment in a suit brought against a debtor will lessen his ability to pay his other debts, does not create in his other creditors such a legal interest as entitles them to be heard upon the questions involved in the suit or to enjoin its prosecution.*"

In *McGoldrick v. Slevin, ubi supra*, the plaintiff, a creditor of one McGoldrick, sought to enjoin certain other creditors of McGoldrick from levying on executions obtained by them against the debtor. The ground alleged for the injunction was in substance that McGoldrick would not be in financial condition to pay the plaintiff's claim and that the execution creditors would obtain preferences. The lower

court issued an injunction restraining the levy. The appellate court reversed the order, and said at p. 535:

> "There is no principle upon which the injunction against McFaddens, Ford, and Sheern can be sustained. They had obtained valid judgments, upon which executions had issued and been placed in the hands of the sheriff. These proceedings gave them a lien upon all the property of the judgment defendants, which was subject to such executions, and this lien was prior and paramount to the claims of the plaintiff in this action. The court possessed no power to enjoin them from having their executions levied."

It is therefore respectfully submitted that the receiver, having no title or legal right in the property of Drake and Buff which the respondent seeks to reach and apply, and never having had possession thereof, and not being a party to the State Court proceedings, he was in the position of a mere stranger and had no standing to entitle him to an injunction against this respondent.

VIII. THE DISTRICT COURT COULD NOT REVOKE THE LEAVE TO SUE.

The receiver contends that the District Court order permitting this respondent to sue did not amount to a final decree and that the District Court, therefore, had the power to revoke the permission. The respondent says that the permission of the District Court was not necessary but that if it was, the same having been given and having been acted upon, the District Court was without power to revoke it.

The only cases cited by the receiver in his brief fall into two classes and it is respectfully submitted that neither of them support his contention.

a. The first class of cases relied upon by the receiver are those where a court in which a suit was pending entered an order on a petition of a third person to intervene in that pending suit.

(Petitioner's Brief pp. 20 and 21.)

In our case, however, this respondent did not ask the District Court for permission to intervene in a suit pending in that court. He asked and obtained leave to begin in another court an entirely new and different proceeding. After the Federal court had entered the order authorizing this respondent to sue, there was nothing more remaining for that court to do or to consider with respect to the respondent's rights against Dempsey, Drake and Buff. The question whether the petitioner had or had not sufficient grounds for maintaining a suit as relator against Drake and Buff was then brought for decision in another court—the state court.

There is thus a great distinction between this situation in the case at bar and the situation in the cases cited by the receiver with respect to the granting of leave to intervene. The court that merely grants leave for a person to present his claims as an intervenor in a suit then pending before it, can hardly be said to be entering a final decree in favor of that party at that point of the mere commencement of the intervenor's litigation before that court. In such case, much more is asked of the court that permits the intervention. That very court is asked to hear and determine the intervenor's rights. It may turn out that the intervenor has no rights in the pending litigation. Hence, the order merely permitting intervention is not a final decree and the cases relied upon by the receiver are therefore not applicable.

The question is not whether an order is labelled "final decree," but whether it is final in character, as concluding a particular matter in pending litigation.

In *U. S. v. River Rouge Co.*, 269 U. S. 411, 46 S. Ct. 144, Mr. Justice Sanford clearly points out the distinction, as follows:

> **"It is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation."**

b. The second class of cases cited by the receiver, are cases where the Federal court permitted suits against its own receiver, as defendant, to be brought in the state court. (Petitioner's brief, pp. 22 and 23.) But in each of those cases, the Federal court held the *res* in which the plaintiff by the state court proceedings sought an interest through a judgment against the receiver. It is as though the stocks, real estate, mortgages and bank accounts of Buff and Drake which have been attached in the state court in the case at bar, had been previously in the hands of the Federal receiver. Under such circumstances, the cases cited by the receiver show that the Federal court could have revoked its leave to sue, because the judgment would affect property in its possession and under its control.

But it is clear that this is not the situation in the case at bar. Neither the District court nor the receiver ever had the property of Drake or Buff which has been attached. Hence, the second class of cases relied upon by the receiver do not apply, and it is respectfully submitted that the majority opinion of the Circuit Court of Appeals was right in

saying that the order granting leave to sue "could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired" (R. 70).

IX. THE ORDER APPEALED FROM IS ERRONEOUS UNDER THE EQUITABLE PRINCIPLES OF LACHES AND ESTOPPEL.

Aside from the considerations of lack of jurisdiction on the part of the District Court and lack of legal standing or right on the part of the receiver to entitle him to the injunction, the respondent says that even if the receiver had had such a right, he would be barred from relief on well recognized principles of equity.

It appears that the respondent instituted the proceedings "after conferring with said receiver *and with his* knowledge" (R. 34, par. 3). Upon the filing of the bill in the State court, the respondent had, with due diligence, obtained preliminary injunctions restraining the transfer or incumbrance by Drake or Buff of certain shares of stock and mortgages, and also obtained attachments on certain bank accounts of Drake, and special attachments on certain real estate belonging to Drake which stood of record in the names of his various nominees (R. 36, par. 9, and pp. 47 and 48, par. 26). Before the receiver's counsel filed the ancillary bill on April 16, 1931, the respondent had thus gone to the trouble and expense of placing himself in a position to have the specific property, covered by said State court injunctions and attachments, reached and applied to the satisfaction of his claim.

On July 7, 1931, the receiver, having been called by the respondent, attended as a witness before the master in the

State court. Mr. Aldridge, one of the counsel for the receiver, was likewise called, and testified, as a witness (R. 34, par. No. 5). There is thus no doubt that they knew that the respondent was being put to the trouble and expense of a contest by Dempsey, Drake and Buff in the proceedings which the District Court had authorized this respondent to institute. But neither the receiver nor his counsel at that time made any objection to the respondent going forward. The receiver waited months thereafter while the respondent was battling before the master. He waited until after the motions to recommit and to reopen the case by an attempted amendment of the answer had been argued and disposed of, and until after the master's report was confirmed on the respondent's motion, and until after the case had become ripe for a final decree and a motion for the entry of such a decree had been filed by the respondent on November 13, 1931, and had been marked for hearing (R. 35, pars. 6 and 7). When Drake and Buff had exhausted their ingenuity in delaying the respondent and when they were facing the prospect of the prompt entry of a final decree, and when Dempsey, Drake and Buff thus seemed no longer able to postpone the day of reckoning with the respondent, whose claim had been admittedly overdue for months, it was then, namely, on November 27, 1931, that the receiver came to their rescue with his motion to stay the respondent (R. 27).

On this record, the respondent respectfully submits that, if the receiver ever had any right to interfere with the State court proceedings, he was guilty of laches by reason of his delay in attempting to exercise that right during all these months while the respondent was diligently pressing forward in those proceedings.

Furthermore, the principle of equitable estoppel applies, for the respondent had changed his position during this lapse of time. He had not only had the trouble of all this litigation, but it appears that he had incurred substantial expense for counsel fees and for other expenses incident to litigation (R. 36 and 37, par. No. 10). The attachments and injunctions which he has obtained in the State court suit have not been duplicated by the receiver in the Federal court proceedings, and it thus appears that the respondent will not and cannot be placed in anywhere near as good a position if he is merely left, at this time, to wait in uncertainty for nearly three years, while Drake and Buff leisurely pay the receiver's unsecured judgment at the rate of one thousand dollars per month, according to the mild order to which the receiver consented (R. 26 and 27).

McLearn vs. Hill, 1931 Mass. Adv. Sheets p. 1791.
Broitman v. Silver, 1932 Mass. Adv. Sh. 535.

In *Broitman v. Silver, ubi supra,* the plaintiff brought a writ of error to reverse a judgment entered for the defendant pursuant to a rescript of the Massachusetts Supreme Court, on the ground that the bill of exceptions filed by the defendant had not been allowed within the time set by law. The court speaking by Rugg, C. J., says at p. 536:

> "It is not necessary to discuss the merits of the points presented because the plaintiff is estopped to raise them at this time. Each and every fact now urged as constituting error was known to the plaintiff or his attorney at the moment it happened. If he had intended to rely upon any or all of them, ample opportunity as matter of law was open to him to present his contention seasonably. * * *

In *McLearn v. Hill, ubi supra,* the defendant, by conduct, led the plaintiff to believe that he would not rely upon

the statute of limitations as a defense to the plaintiff's cause of action. At a later stage, the defendant set up the statute of limitations in his answer, which would have been a good defense if the doctrine of estoppel had not intervened, but the court held that since he had misled the plaintiff to his detriment, he could not, therefore, set up the statute of limitations as a defense. The court said, by Rugg, C. J., at p. 1795,

> "It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law. It has been said that, 'In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow.'"

It is respectfully submitted that the same principles should apply in the case at bar, for the receiver, knowing of the State court suit, sat by and raised no objection to the respondent's continuing with the hearings before the master and going to the expense of employing counsel and incurring other expense of litigation.

X. NO EVIDENCE WAS INTRODUCED AT THE HEARING ON THE RECEIVER'S "MOTION" TO WARRANT THE INJUNCTION.

The motion was not under oath. It alleged as a ground for the injunction, as follows:

> "that if the said Louis Raphael is permitted to proceed further in said cause in the Superior Court in and for the County of Suffolk, Commonwealth of Mas-

sachusetts, the proper and orderly administration of the receivership in this court will be seriously interfered with" (R. 28).

This was not an allegation of fact, but a statement of an opinion or conclusion of the receiver. The sworn plea filed by the respondent met this allegation squarely by setting out specifically:

> "That said Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors of said Monroe Stores, Inc. whose claims have been proved and allowed; that said Drake and Buff are therefore amply able forthwith to pay said obligation to said Raphael as they are in law bound to do, and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them" (R. 38, par. No. 15).

The respondent also introduced the master's findings as to the valuable property of which Drake and Buff were possessed, and those findings were summarized in the body of the plea. (R. 36, par. 8.)

The stenographic report of the hearing on the receiver's motion shows that the receiver introduced no evidence. (R. 51 to 59.) It was on this record, and in the absence of any evidence to support said allegation of the receiver's motion that the District Court issued the injunction against this respondent.

It is respectfully submitted that in the absence of evidence, the District Court could not deprive this respondent of the right to proceed with the State court suit, even if the District Court had had jurisdiction, and even if the

receiver had had the necessary legal standing and interest.

General Inv. Co. v. Lake Shore Ry., 260 U. S. 261; 43 S. Ct. 106 at 117.

Behne v. Anchor Insurance Co., 297 Fed. 986 at 989, C. C. A. 2nd.

Nottebaum v. Leckie, 31 Fed. (2) 556, at 560 (C. C. A.).

Clayton Act, 28 U. S. C. A. §381.

In *Nottebaum v. Leckie, ubi supra,* the Circuit Court held at p. 560:

"* * * * * The plaintiff, on whom rests the burden, must show to the court such facts as will justify a preliminary injunction."

XI. THE INJUNCTION WAS UNWARRANTED BECAUSE THE DISTRICT COURT LACKED JURISDICTION OVER THE RESPONDENT.

1. The respondent was not a resident or citizen of Massachusetts, but of New Britain, in the County of Hartford, in the State of Connecticut (R. 37, par. 13) and no personal service was made upon him. There was no compliance with the restraining order and order of notice, issued on November 30, 1931 against this respondent, which required "that notice be given to said Louis Raphael by said receiver by serving him with a copy of this order forthwith (R. 32). However, service was made on Mark Horblit without setting forth who the said Horblit was (Marshal's return, R. 32). This defence was specifically raised by the appellant's plea (R. 37, par. 13).

Where the order of notice requires "serving" on "him" it means personal service on the respondent and not on his agent.

U. S. S. C. Eq. Rule 13 (226 U. S. 652).
Flexner v. Farson, 248 U. S. 289, 39 S. Ct. 97.
United Drug Co. v. Cordley and Hayes, 239 Mass. 334. (Officer's return on agent.)

Service on the attorney for the respondent under Massachusetts General Laws, c. 227, §§2, 3 is not permissible because the parties in the State Court proceedings are not the same as those in the Federal Court.

Kimball v. Sweet, 170 Mass. 538, 539.
cf. *Young Co. v. McNeal Edwards Co.,* 283 U. S. 398, 51 S. Ct. 538.

2. The injunction issued by the District Court against this respondent was entered on a "motion" filed by the receiver as part of the case of *J. B. Hirshfeld & Co., Inc., et al. v. Monroe Stores, Inc.,* No. 3293, Eq. (R. 27). The respondent was not named as a party plaintiff or defendant in that case (R. 1 and 2, par. A). Nor did he ever become a party to that bill. While he had presented a proof of claim in the receivership, he had done so as the result of an order limiting the time for the proving of claims (R. 8, pars. 3 and 4). So far as the District Court was concerned, the allowance of the proof of claim constituted final judgment thereon. It was only for this purpose and to this extent that the District Court had jurisdiction by reason of the presentation of the proof of claim. It is respectfully submitted that it would be going a long way to hold that a creditor, who merely presents a proof of claim in an equity receivership in a District Court of the United States, thereby submits himself to its jurisdiction for purposes other than to have his claim allowed.

3. Nor did the filing of the petition for leave to sue submit the appellant to the jurisdiction of the District

Court for any purpose other than the limited one of obtaining the allowance of that petition.

Continental Trust Co. v. Toledo Ry. Co., 82 Fed. 642.

In that case, it was held by Taft, Cir. J., at p. 645,

> "* * * But care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the *res* acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect to the *res*, parties to the original are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof."

Conclusion.

It is therefore respectfully submitted that the majority of the Circuit Court of Appeals was right in reversing the injunction issued by the District Court.

Respectfully submitted,

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